Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 268

RAYMOND BURNS, *Petitioner,*

v.

THE STATE OF NEW MEXICO, BUREAU OF REVENUE, INCOME TAX DIVISION, VICENTE OJINAGA, Acting Director, *Respondents,*

AND

JAMES B. HERT, *Petitioner,*

v.

THE STATE OF NEW MEXICO, BUREAU OF REVENUE, INCOME TAX DIVISION, HOWARD DOWNING, Acting Director, *Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinion Below	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	7
Argument	8
Conclusion	15

LIST OF AUTHORITIES

CASES:

Arlidge v. Mabry, 52 N.M. 303, 197 P.2d 884 (1948)	11
Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co., 288 U.S. 326 (1913)	12
District of Columbia v. John R. Thompson Co., Inc., 346 U.S. 100 (1953)	9
Edelman v. California, 344 U.S. 357 (1953)	13
General Supply Co. v. Cook, 281 U.S. 647 (1930)	9
Howard v. Commissioners, 344 U.S. 624 (1953)	9, 10
Humble Pipe Line Co. v. Waggoner, 376 U.S. 369, 374 (1964)	9
In Re Reilly's Estate, 63 N.M. 352, 319 P.2d 1069 (1957)	13
James v. Dravo Contracting Co., 302 U.S. 134 (1937)	9
James Stewart & Co. v. Sadrakula, 309 U.S. 94, 100 (1940)	8
Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449 (1960)	13
Mellon v. O'Neil, 275 U.S. 212 (1927)	12
Murray v. Joe Gerrick & Co., 291 U.S. 315 (1934)	9
New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937)	12
Offutt Housing Co. v. County of Sarpy, 351 U.S. 253 (1956)	9
Oxley Stave Co. v. Butler County, 166 U.S. 648 (1897)	13
Paul v. United States, 371 U.S. 245, 268 (1963)	8
Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 383 (1964)	9
Shaffer v. Carter, 252 U.S. 37 (1920)	13
Silas Mason Co. v. Tax Commission, 302 U.S. 186 (1937)	11

Page

S.R.A., Inc. v. Minnesota, 327 U.S. 558, 564 (1946) .. 12
Standard Oil Co. v. California, 291 U.S. 242 (1934) .. 9
Superior Bath House Co. v. McCarroll, 312 U.S. 176 (1941) 9
Travis v. Yale & Towne Manufacturing Co., 252 U.S. 60 (1920) 13
United States v. Sharpnack, 355 U.S. 286 (1958) 9

UNITED STATES CONSTITUTION:

Article I, Section 8, Cl. 17 ..... 2, 9
Article IV, Section 2, Cl. 1 ..... 2, 12
Amendment XIV, Section 1 ..... 2, 12

FEDERAL STATUTES:

4 U.S.C. Section 106 2
4 U.S.C. Sections 106-110 ..... 10, 11
4 U.S.C. Section 110(e) 3
40 U.S.C. Section 255 10

NEW MEXICO STATUTES:

N.M.S.A. 72-15-1 ..... 3, 8, 14
N.M.S.A. 72-15-1.1 ..... 4, 11
N.M.S.A. 72-15-3(p) 4
N.M.S.A. 72-15-6A and B 5, 14
N.M.S.A. 72-15-21A and E 5, 14
N.M.S.A. 72-15-22 ..... 6, 14
N.M.S.A. 7-2-7 7

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OPINION BELOW

The opinion of the Supreme Court of the State of New Mexico is reported at 439 P. 2d 702.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. United States Constitution

ARTICLE I, SECTION 8, CLAUSE 17:

> To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings;

ARTICLE IV, SECTION 2, CLAUSE 1:

> The Citizen of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

AMENDMENT XIV, SECTION 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Federal Statutes

BUCK ACT, 4 U.S.C. § 106 (1940) (Vol. 1 at 106):

> (a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his

residing within a Federal area or receiving income from transactions occurring or services performed in such area; and *such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.* (Emphasis added)

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.

BUCK ACT, 4 U.S.C. § 110(e) (1940) (Vol. 1 at 107):

As used in sections 105-109 of this title:

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

C. New Mexico Statutes

Section 72-15-1, N.M.S.A., 1953 Compilation (1963), N.M. Laws 1963, ch. 323, § 2 (Vol. 10, pt. 2, 1963 Supp. at 40-41):

A. There is assessed and levied a tax for the use of the state general fund and the state government, at the rates specified in sections 72-15-1 through 72-15-48 New Mexico Statutes Annotated, 1953 Compilation upon the net income of every:

(1) resident individual, trust, fiduciary or estate of the state;

(2) domestic corporation or association, and of every nonresident individual, trust, fiduciary, or estate having a business, agency or employment, or

engaged in the transaction of business in, into or from this state, or deriving any income from any property or employment within this state, in proportion to the net income of the business, agency or employment as hereinafter provided.

B. No state income tax shall be assessed and levied for the year 1963 or any subsequent year upon:

(1) any married taxpayer filing a joint federal income tax return whose net income, as that term is defined in section 72-15-6 New Mexico Statutes Annotated, 1953 Compilation, is fifteen hundred dollars ($1500) or less, or

(2) any individual taxpayer who has one [1] or more dependents and whose net income, as that term is defined in section 72-15-6 New Mexico Statutes Annotated, 1953 Compilation, is fifteen hundred dollars ($1500) or less.

Section 72-15-1.1, N.M.S.A., 1953 Compilation (1957) (Vol. 10, pt. 2 at 283):

No person shall be relieved from liability for any income tax levied by this state, or by any duly authorized taxing authority herein, having jurisdiction to levy such a tax, by reason of his residing within a federal area or receiving income from transactions occurring or work or services performed in such area, with such taxes applying in federal areas to the extent permitted by Acts of Congress.

Section 72-15-3 (p), N.M.S.A., 1953 Compilation (1933) (Vol. 10, pt. 2 at 285):

For the purpose of this act [72-15-1 to 72-15-48], and unless otherwise required by the context:

* * *

(p) "Business" includes trade, profession, occupation or employment.

Section 72-15-6A and B, N.M.S.A., 1953 Compilation (1961) (Vol. 10 pt. 2 at 286):

A. "Base income" of a taxpayer means that part of the taxpayer's income generally defined as federal taxable income and upon which the federal income tax is calculated less the federal income tax payable for the taxable year.

B. The "net income" of all taxpayers shall be the "base income" adjusted to provide that:

(1) Amounts that have been taxed as income in a previous year by the state shall not be taxed again;

(2) Amounts, including net operating losses, that have been deducted in a prior year's computation of state income tax liability shall not be deducted again;

(3) Amounts included in base income that the state is prohibited from taxing because of the provisions of the federal Constitution, the state Constitution or federal laws shall be deducted; and

(4) The full amount of the federal capital gains deductions for the taxable year shall be added to the base income if not included in that figure and shall be subject to state income tax.

Section 72-15-21A and E, N.M.S.A., 1953 Compilation (1961) (Vol. 10 pt. 2, at 290-291):

A. The tax assessed by sections 72-15-1 through 72-15-48 New Mexico Statutes Annotated, 1953 Compilation is imposed at the following rates upon every resident and nonresident individual of this state, and the tax shall be levied, collected and paid annually upon his net income taxable in this state:

(1) One and one-half per cent [1½%] [1% after December 31, 1963] on net income up to and including ten thousand dollars ($10,000);

(2) Three per cent [3%] [2% after December 31, 1963] on that net income in excess of ten thousand dollars ($10,000) and not exceeding twenty thousand dollars ($20,000);

(3) Four and one-half per cent [4½%] [3% after December 31, 1963] on all net income in excess of twenty thousand dollars ($20,000) and not exceeding one hundred thousand dollars ($100,000);

(4) Six per cent [6%] [4% after December 31, 1963] on all net income in excess of one hundred thousand dollars ($100,000).

* * *

E. The tax assessed by the provisions of sections 72-15-1 through 72-15-48 New Mexico Statutes Annotated, 1953 Compilation is imposed at the same rates upon the net income of nonresident individuals of this state in so far as and to the extent that the net income was derived from property owned or business, trade, profession or occupation carried on in this state by those individuals.

Section 72-15-22, N.M.S.A., 1953 Compilation (1961) (Vol. 10 pt. 2 at 292):

In the case of a nonresident individual transacting business both within and without this state the tax imposed shall be upon the portion of his entire net income for each taxable year as is derived from sales, wherever made, of products, goods, wares and merchandise, manufactured, or which originated, in this state, and from other business done or property located within this state, which may be determined by an allocation and separate accounting when books of the individual show income derived from business done and property located within this state; otherwise the income tax imposed by section 72-15-21 New Mexico Statutes Annotated, 1953 Compilation shall be on the pro-

portion of the entire net income of the individual equal to the ratio of his gross receipts in this state during the taxable year to his total gross receipts on business transaction both within and without the state during that year.

Section 7-2-7, N.M.S.A., 1953 Compilation (1941) (Vol. 2 at 322):

> Exclusive jurisdiction is hereby ceded to the United States over all the territory set apart from the public domain and comprised within the limits of the Fort Wingate Military Reservation, in McKinley County, and Fort Bliss Target Range, in Dona Ana County, and over such land as may hereafter be reserved from the public domain for the enlargement of said reservations; Provided, however, that the state of New Mexico reserves the right to serve civil or criminal process within said reservations in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state, but outside of such cession and reservations; and Provided further, that the jurisdiction herein ceded shall continue no longer than the United States shall own and hold said reservations for military purposes.

STATEMENT OF THE CASE

In 1964, the Secretary of the Treasury of the United States consented to the withholding of New Mexico income tax from petitioners' earnings. The Department of the Army, by order of the Commanding General at White Sands Missile Range, began withholding the tax from petitioners' earnings and remitting it to the State of New Mexico. (Hert 22-23; Burns 12-13)

Petitioners brought separate actions in the District Court of Santa Fe County, New Mexico to recover the amounts withheld from their earnings, alleging gener-

ally that the New Mexico income tax law was unconstitutional. (Hert 11-12; Burns 4-5) Petitioner Hert also alleged that because he had not filed an income tax return, respondents could not determine that he owed any income tax and that therefore, withholding from his earnings deprived him of his property without due process of law. (Hert 12) Petitioner Burns also alleged that the non-resident income tax returns devised by respondents deprived him of due process of law and unlawfully discriminated against him. (Burns 6-7)

The New Mexico Supreme Court held that under the Buck Act, New Mexico has jurisdiction to impose its income tax upon income earned by persons at the White Sands Missile Range.

ARGUMENT

1. The major premise of petitioners' argument apparently is that only those state laws existing at the time of the cession to the United States of exclusive jurisdiction over the White Sands Missile Range apply within the federal enclave. Petitioners claim that the Buck Act is merely a codification of this rule and that because Section 72-15-1, N.M.S.A., 1953 Compilation was enacted subsequent to the cession of jurisdiction, does not apply to persons earning income within the White Sands Missile Range.

Petitioners rely on the rule quoted in *Paul* v. *United States,* 371 U.S. 245, 268 (1963). The reason for this rule is that federal enclaves must be left with a developed legal system for *private rights. James Stewart & Co.* v. *Sadrakula,* 309 U.S. 94, 100 (1940). The rule does not allow the states to levy taxes within federal enclaves even if the tax laws were in existence at the

time jurisdiction over the enclaves was ceded to the United States. *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937); *Standard Oil Co.* v. *California*, 291 U.S. 242 (1934); *General Supply Co.* v. *Cook*, 281 U.S. 647 (1930). Under Article I, § 8, cl. 17 of the United States Constitution, Congress may modify the application of both rules.

Congress has the power to apply to federal enclaves state laws enacted subsequent to the cession of jurisdiction over the enclaves, *United States* v. *Sharpnack*, 355 U.S. 286 (1958); *Murray* v. *Joe Gerrick & Co.*, 291 U.S. 315 (1934), the power to grant to local legislative bodies the right to exercise jurisdiction over federal enclaves, *District of Columbia* v. *John R. Thompson Co., Inc.*, 346 U.S. 100 (1953) and the power to grant the States permission to levy taxes within federal enclaves, *Offutt Housing Co.* v. *County of Sarpy*, 351 U.S. 253 (1956); *Howard* v. *Commissioners*, 344 U.S. 624 (1953), including taxes levied under tax laws enacted subsequent to the grant of permission, *Superior Bath House Co.* v. *McCarroll*, 312 U.S. 176 (1941). Under the Buck Act, Congress has exercised its constitutional power and has granted the States permission to levy certain taxes within federal enclaves. *Humble Pipe Line Co.* v. *Waggoner*, 376 U.S. 369, 374 (1964); *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361, 383 (1964); *Offutt Housing Co.* v. *County of Sarpy*, *supra* at 256-257; *Howard* v. *Commissioners*, *supra* at 627.

In *Howard* v. *Commissioners*, *supra*, the United States acquired land in Kentucky, upon which a Naval Ordnance Plant was located, by condemnation proceedings filed in 1940. In 1941, the Secretary of the Navy,

on behalf of the United States, accepted exclusive jurisdiction over the area and the Governor of Kentucky acknowledged this acceptance. The United States did not acquire exclusive jurisdiction over the area until it was accepted in 1941. 40 U.S.C., § 255 (1940). In 1947 and 1950, the City of Louisville annexed certain territory, including the Ordnance Plant and began collecting a license tax from persons employed at the Ordnance Plant. The ordinance imposing the tax was enacted in 1950. The facts of *Howard* v. *Commissioners of the Sinking Fund of the City of Louisville, supra,* are identical with those of the instant case.

Employees of the Ordnance Plant brought an action for a declaratory judgment that the Ordnance Plant was not within the City of Louisville and that they were not subject to the tax levied by the City. This Court held at 344 U.S. 626-627 that the property did not cease to be a part of Kentucky when it was acquired by the United States and became a part of the City of Louisville by annexation and that the right to tax income paid to employees who worked at the Ordnance Plant was granted the City of Louisville by the Buck Act. At 344 U.S. 629, this Court said that "By virtue of the Buck Act, the tax can be levied and collected within the federal area, just as if it were not a federal area."

The language of 4 U.S.C. §§ 106 and 110 clearly indicates that Congress intended to grant the States permission to impose income taxes on persons earning income within federal enclaves even if jurisdiction over the enclaves was ceded after enactment of the Buck Act and even if the tax laws are enacted subsequent to enactment of the Buck Act. Under 4 U.S.C. § 106, the States are given "full jurisdiction and power to levy

and collect . . . [any income] tax in any Federal area within . . . [the] States to the same extent and with the same effect as though . . . [the] area was not a Federal area." The grant of permission to tax is not restricted to income tax laws enacted prior to the enactment of the Buck Act but applies to "*any* income tax". 4 U.S.C. § 106. Moreover, the grant is not restricted to federal areas that were ceded to the United States before the enactment of the Buck Act but applies to "*any* Federal area". 4 U.S.C. §§ 106 and 110. Thus, for income tax purposes, all federal areas are treated as if they are the same as any other part of the State.

If the interpretation of the Buck Act advocated by petitioners were adopted, some States would have jurisdiction to levy taxes in federal enclaves while other States would not have such jurisdiction. This interpretation defeats the intent of Congress as expressed by the unrestricted language of the Buck Act.

In *Arlidge* v. *Mabry,* 52 N.M. 303, 197 P. 2d 884 (1948), the Court held only that residents of Los Alamos did not qualify as voters under the New Mexico Constitution.

The Supreme Court of New Mexico held that even though exclusive jurisdiction over the White Sands Missile Range was ceded after the enactment of the Buck Act, New Mexico must be presumed to have accepted the permission to tax that was granted in the Buck Act. *Silas Mason Co.* v. *Tax Commission,* 302 U.S. 186 (1937). If acceptance of permission to tax is necessary, New Mexico showed its acceptance in Section 72-15-1., N.M.S.A. 1953 Compilation and by levying its income tax on incomes earned within the White

Sands Missile Range. *S.R.A., Inc.* v. *Minnesota,* 327 U.S. 558, 564 (1946).

2. The issues that petitioners raise concerning the constitutional authority of New Mexico to tax nonresidents were never raised in the Court below or decided by those Courts.

There is no doubt that petitioners questioned the jurisdiction and authority of New Mexico to levy its income tax on petitioners, but the records in these cases are devoid of any suggestion that the grounds now raised were raised in the Courts below. Petitioners claimed that the New Mexico income tax laws were unconstitutional. (Hert 11-12; Burns 4-7). Without more, such a claim will be taken as intended to apply to the New Mexico Constitution, not to the United States Constitution. *Consolidated Turnpike Co.* v. *Norfolk & O. V. Ry. Co.,* 228 U.S. 326 (1913). Petitioners also claimed that the New Mexico income tax laws violated Article IV, § 2 and Amend. XIV, § 1 of the United States Constitution. (Hert 12; Burns 6-7) Petitioners did not preserve their claims under these Federal constitutional provisions, with the exception of the claim that New Mexico discriminated in favor of military personnel in violation of Amend. XIV, in their Requested Conclusions of Law in the District Court below. (Hert 33-34; Burns 19-20) Petitioners' claim that the New Mexico income tax law violated these Federal constitutional provisions did not specify that the ground for such a claim was that New Mexico does not have the constitutional authority to tax nonresidents. The issues now raised were not properly presented and preserved for review. *New York ex rel. Cohn* v. *Graves,* 300 U.S. 308 (1937); *Mellon* v. *O'Neil,* 275 U.S. 212

(1927); *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648 (1897).

Under New Mexico practice, a constitutional issue that is not raised in the trial court cannot be raised on appeal in the New Mexico Supreme Court. *Johnson* v. *Sanchez,* 67 N.M. 41, 351 P. 2d 449 (1960); *In Re Reilly's Estate,* 63 N.M. 352, 319 P. 2d 1069 (1957). Petitioners' failure to raise the issues concerning New Mexico's constitutional authority to levy its income tax on nonresidents in the trial court below is an adequate state ground for the decision of the New Mexico Supreme Court. *Edelman* v. *California,* 344 U.S. 357 (1953).

3. In *Shaffer* v. *Carter,* 252 U.S. 37 (1920) and in *Travis* v. *Yale & Towne Manufacturing Co.,* 252 U.S. 60 (1920), this Court held that the States may constitutionally tax the income nonresidents derive from engaging in occupations within their borders. In *Shaffer* v. *Carter, supra,* this Court said at 52-53 that:

> And we deem it clear, upon principle as well as authority, that just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein; * * *
>
> * * *
>
> That a State, consistently with the Federal Constitution, may not prohibit the citizens of other States from carrying on legitimate business within its borders like its own citizens, of course is granted; but it does not follow that the business of non-residents may not be required to make a

> ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one State has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such non-resident, although not personally yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter State. Section 2 of Art. IV of the Constitution entitles him to the privileges and immunities of a citizen, but no more; not to an entire immunity from taxation, nor to any preferential treatment as compared with the resident citizens. It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption.

The New Mexico income tax is levied only upon that part of petitioners' income as is derived from their occupations carried on in New Mexico. Sections 72-15-1, 72-15-21E and 72-15-22, N.M.S.A., 1953 Compilation. The New Mexico income tax is not levied upon income derived from sources located outside New Mexico. Petitioners are subject to the same rate of taxation as are residents of New Mexico, Section 72-15-21, N.M.S.A., 1953 Compilation, they are entitled to the same exemptions as are residents, Section 72-15-1, *supra* and they are entitled to take the same deductions as are residents, Section 72-15-6, N.M.S.A., 1953 Compilation. Because petitioners are accorded the same treatment as are residents of New Mexico, the imposition of the tax upon that part of their income derived from sources in New Mexico does not deny them the privileges and immunities of citizens of New Mexico or the equal protection of the laws. Petitioners are not entitled to greater privileges and immunities.

New Mexico gave petitioners the opportunity to engage in their occupations in the State. The business productivity generated by New Mexico affords petitioners the benefits of employment in the State. New Mexico laws afford petitioners an organized and orderly society within which to engage in their occupations and afford property, business and industry the protection and security without which gainful occupation would be impossible. In the instant case, petitioners have used the Courts of New Mexico to protect their property rights. New Mexico has afforded petitioners benefits and protection in return for which it levies its taxes, consistently with due process. Respondents submit that a remand of these cases would serve no useful purpose.

CONCLUSION

By reason of the foregoing respondents respectfully submit that petitioners have failed to present Federal questions of substance and that the Writ should be denied.

Respectfully submitted,

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